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No. 05-1597

IN THE

Supreme Court of the United States

WILLIAM TUCKER AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CYNTHIA DELORES TUCKER, A/K/A C. DELORES TUCKER, FOR C. DELORES TUCKER, DECEASED AND WILLIAM TUCKER,

Petitioners,

v.

PHILADELPHIA DAILY NEWS, PHILADELPHIA NEWSPAPERS, INC. AND KNIGHT RIDDER, INC., *ET AL.*,

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a public figure plaintiff in an action for defamation is required to plead actual malice in accordance with the pleading standards of the jurisdiction in which the action is filed.

RULE 29.6 STATEMENT

Respondent Philadelphia Daily News is a publication of Philadelphia Newspapers, LLC, not a corporate entity.

Respondent Philadelphia Newspapers, Inc., now Philadelphia Newspapers, LLC, was wholly owned by Knight Ridder, Inc. until June 27, 2006. On that date, The McClatchy Company purchased Knight Ridder, Inc. On June 29, 2006, The McClatchy Company sold Philadelphia Newspapers, LLC to Philadelphia Media Holdings LLC. No publicly held company owns 10% or more of Philadelphia Media Holdings LLC.

Knight Ridder, Inc., was purchased by The McClatchy Company, which sold Knight Ridder's former subsidiary, Philadelphia Newspapers, LLC, to the Philadelphia Media Holdings LLC, as described above.

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BRIEF IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied. The Supreme Court of Pennsylvania's decision that defamation plaintiffs, like other plaintiffs, must comply with Pennsylvania's pleading standards in order to survive dismissal on preliminary objections, is not inconsistent with this Court's decisions, and does not present a federal question. *See* Pet. App. 73a-74a, and as applied on remand, *id.* at 1a, 3a, 20a.

STATEMENT

This defamation case has been before the Pennsylvania Supreme Court twice. In its initial review, that court ruled that petitioners' allegations related to actual malice did not meet the standard for specificity required under Pennsylvania's pleading rules and remanded with leave to replead. On remand, petitioners' amended complaint was found inadequate on the same ground and dismissed.

1. Petitioners are William Tucker, and William Tucker on behalf of his late wife C. Delores Tucker and her estate.

C. Delores Tucker led a high-profile crusade against "gangsta" rap lyrics during the 1990s. Pet. App. 36a. Tupac Shakur responded by incorporating lyrics about her in an album. *Id.* at 37a. The Tuckers sued the Estate of Tupac Shakur and entities involved in producing and selling the album for $10 million claiming, *inter alia*, that as a result of the emotional distress caused his wife, William Tucker had suffered "a loss of advice, companionship and consortium." *Id.* at 39a. Mrs. Tucker issued a press release announcing the suit and that her husband joins her as a plaintiff.

One year later, the Tuckers filed this lawsuit against various newspapers, claiming they were defamed by articles interpreting the loss of consortium claim to include damage to their sexual relationship. *Id.* at 40a.

The Tuckers also filed a similar lawsuit against *Time*, *Newsweek* and the attorney for the Estate of Shakur in federal court. Summary judgment was granted in favor of *Time* and *Newsweek* for lack of actual malice, before the Pennsylvania Supreme Court's initial review of this suit. *Id.* at 40a-41a.

2. The Pennsylvania Supreme Court concluded that the Tuckers, by alleging that the articles had made them objects of ridicule, had pleaded – albeit barely – that the articles were capable of defamatory meaning. *Id.* at 56a.

However, the court found the Tuckers' actual malice allegations impermissibly vague under Pennsylvania Rule of Civil Procedure 1028(a)(3) and ruled that the complaint must be dismissed with leave to amend. *Id.* at 73a-74a. The court held that the newspapers' interpretation of loss of consortium to include loss of sexual relations could not be found inherently improbable or obviously suspect because it was reasonable to rely on the legal meaning of loss of consortium and on an opposing lawyer's conclusion that a loss of sexual relations claim was included. *Id.* at 57a.

The court then analyzed the Tuckers' allegations to determine whether any were legally sufficient, if true, to state the actual malice component of a claim for defamation, as required under Pennsylvania's Rule of Civil Procedure 1028(a)(4) (providing that legal insufficiency of a pleading is a ground for dismissal on preliminary objections). The actual malice standard it relied on was "clear and convincing evidence that the allegedly defamatory statements were false and that [the newspapers] either knew they were false or recklessly disregarded their falsity." *Id.* at 58a. In reviewing the pleadings, it accepted "all well-pleaded allegations of the

complaint as true," and resolved doubts in favor of plaintiffs. *Id.* at 65a-66a.

The court first concluded "several of the Tuckers' allegations are based upon an incorrect understanding of the articles the [newspapers] published." *Id.* at 66a. The court found that the Tuckers mischaracterized the articles, which had stated the opposite of what the allegations claimed.

Second, the court found the Tuckers' allegation that the newspapers failed to consider their press release insufficient to allege actual malice because the press release had not, in fact, clarified that the loss of consortium claim did not include a claim for diminished sexual relations. It said only that William Tucker joins his wife as a plaintiff. *Id.* at 68a.

Third, the court found the Tuckers' allegation that the newspapers' decision to quote the attorney for Shakur's estate about the loss of consortium claim insufficient to allege actual malice because the attorney was "an entirely appropriate person for the newspapers to have interviewed," as the attorney for a defendant to the suit. *Id.* The court also noted that the *Philadelphia Daily News* had acted in an even handed manner by extensively quoting the attorney for the Tuckers in response to the comments of the estate's attorney. *Id.* at 69a.

Fourth, the court rejected a grab bag of allegations that the newspapers had failed to conduct sufficient research before publishing as legally insufficient to allege actual malice. The allegations included: failing to do research into the Tuckers' background – their ages, years of marriage, religious and moral upbringing, and emphasis on privacy; failing to rely on the best sources; sensationalizing the news; failing to check the sources and accuracy of the stories. The court viewed these as alleging that the newspapers departed from reasonably prudent conduct and found this was legally insufficient to allege actual malice. *Id.* at 75a (relying on

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)).

The one allegation the Pennsylvania Supreme Court found potentially sufficient to allege actual malice was the Tuckers' allegation that some of the defendants had been told by the Tuckers' attorney that the Tuckers were not claiming damage to their sexual relationship in this suit. *See* Pet. App. 69a. The court found that a newspaper that had disregarded such a statement might be found to have acted with actual malice because the plaintiff is the master of his claim. *Id.* at 70a. The court, however, found the allegation ambiguous because it did not specify to whom the attorney had spoken. Because a number of the original defendants were no longer in the case, it was not clear that the attorney had provided that information to any of the remaining defendants. *Id.* at 73a.

The court also noted that the Tuckers had included the same allegation in their suit against *Time* and *Newsweek*, but that their attorney later had admitted under oath that he had not told these reporters that the case did not involve damage to sexual relations, and that he thought when the complaint against Shakur *et al.* was filed, that the loss of consortium claim was "to cover everything." *Id.* at 70a-71a. The court also noted that the Tuckers and their attorney had been interviewed repeatedly and had failed to clarify in any of the interviews that they were not seeking compensation for injury to their sexual relations. *Id.* at 71a-72a.

Because the Pennsylvania Supreme Court could not determine whether the Tuckers had, in fact, intended to plead that their attorney had specifically told any of the remaining defendants that the loss of consortium claim did not include loss of sexual relations, the court did not take it upon itself to read this ambiguity out of the complaint. Rather, it sought to provide the Tuckers with the opportunity to fix the ambiguity by amending the one allegation that was potentially capable

of being legally sufficient to state actual malice by clarifying that it applied to any of the current defendants. *Id.* at 74a.

Contrary to the suggestion in the Tuckers' Question Presented, the Pennsylvania Supreme Court did not rule that defamation claims invariably require public figure plaintiffs to have unequivocally told the publisher that the information it is about to print is false. Rather, that court painstakingly reviewed the specific allegations the Tuckers chose to include to determine whether any were legally sufficient to allege actual malice, and concluded that the only one that might be read to do so was too ambiguous to satisfy Pennsylvania's pleading requirements. Instead of dismissing the complaint outright, the court explained to the Tuckers in detail the nature of the deficiency and how it could be solved, and provided them with an opportunity to try again.

3. On remand, the Tuckers amended their complaint, but in a manner that carefully sidestepped stating that their attorney had told the remaining newspaper defendants that their lawsuit did not claim loss of sexual relations. Instead, the new allegation read: "The reporter for the Philadelphia Daily News talked to Plaintiffs' counsel, Richard C. Angino, who answered his questions and explained the basis of the Tuckers' Complaint, which did not involve the Tuckers' sex life." *Id.* at 124a.

In other words, the allegation does not say that Angino *told* the reporter that the complaint did not involve the Tuckers' sex life, it just maintained to the court that the complaint did not involve the Tuckers' sex life. In light of the Pennsylvania Supreme Court's detailed discussion, it was clear that the sidestepping was not accidental and that yet another opportunity to replead would be unavailing.

The trial court dismissed the case for failing to allege anything that, if true, would support actual malice. *Id.* at 25a.

The intermediate appellate court affirmed. *Id.* at 19a. The Pennsylvania Supreme Court denied review. *Id.* at 1a.

DISCUSSION

The question presented does not warrant plenary review.

I. THE DECISION BELOW IS NOT INCONSISTENT WITH THIS COURT'S JURISPRUDENCE.

A. The Pennsylvania Courts Applied Established Law To Both Federal And State Questions.

With respect to actual malice, the Pennsylvania Supreme Court applied the actual malice standard this Court set forth in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) – that a defamation plaintiff must establish by clear and convincing evidence that the defendants either knew the allegedly defamatory statements were false or recklessly disregarded their falsity. *See* Pet. App. 58a, 65a. The court further applied this Court's teaching that courts have an independent obligation to review evidence of actual malice to ensure it meets the constitutional standard, but factual disputes with respect to that evidence go to the jury. *See* Pet. App. 64a (relying on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990), and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991)).

With respect to the sufficiency of the Tuckers' pleadings, the Pennsylvania Supreme Court applied Pennsylvania law. Under Pennsylvania's Rules of Civil Procedure, dismissal is warranted for "insufficient specificity in a pleading" or "legal insufficiency of a pleading." Pa. R. Civ. P. 1028(a)(3), (a)(4). Moreover, a higher degree of specificity is required under Pennsylvania law than under federal rules. Pennsylvania is a fact pleading state. *See, e.g., Miketic v. Baron*, 675 A.2d 324, 330 (Pa. Super. Ct. 1996). Notice pleading is insufficient. "Under the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to

that end must be set forth in the complaint." *Santiago v. Pa. Nat'l Mut. Cas. Ins. Co.*, 613 A.2d 1235, 1238 (Pa. Super. Ct. 1992).

The actual malice standard, an admittedly federal issue, is not disputed here. Petitioners do not assert that the state courts misunderstood the constitutional standard promulgated by this Court.

The pleading standards do not appear to fall within this Court's jurisdiction. Certainly, the Pennsylvania Supreme Court is the final arbiter of the nature and scope of those standards. To the extent that petitioners are urging this Court to rule that the First Amendment's guarantee of freedom of speech provides some type of protection to defamation *plaintiffs* from generally applicable rules of civil procedure, such a position is untenable and unworthy of this Court's attention.[1] The First Amendment does not afford plaintiffs a protected right to sue for defamation in the hope that a fishing expedition will reveal some basis for establishing actual malice when the state's civil procedure rules do not afford any plaintiffs the right to bring claims without alleging a factual basis for them.

B. The Decision Below Is Not Inconsistent With *Herbert v. Lando.*

Petitioners are incorrect that the rule applied by the Pennsylvania Supreme Court is inconsistent with *Herbert v. Lando*, 441 U.S. 153 (1979). *See* Pet. App. 10. *Herbert v. Lando* did not address whether particular pleading

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[1] The basis for jurisdiction asserted by petitioners is a right, privilege or immunity under the United States Constitution. Pet. 3. Petitioners have not complied with Rule 14(f) by identifying which federal constitutional provision they believe is at issue. However, they appear to be relying on the First Amendment, as the only decisions they cite are those interpreting that amendment.

requirements were required or precluded by the First Amendment. It did not address pleading at all. Rather, it rejected an evidentiary privilege for editorial processes, that was urged on First Amendment grounds, as applicable to block certain types of discovery. 441 U.S. at 170.

Moreover, in rejecting a constitutional privilege against discovery of editorial processes, *Herbert v. Lando* did not – even in the discovery context – recognize a constitutional privilege for defamation plaintiffs to engage in such discovery notwithstanding otherwise applicable restrictions. To the contrary, this Court emphasized that courts could, and should, exercise their powers under the applicable rules of civil procedure. Thus, it urged federal courts to preclude such discovery when it was inconsistent with the generally applicable federal discovery standards – *i.e.*, if it would be irrelevant, unreasonably annoying, embarrassing, oppressive, or burdensome. *Id.* at 177.

The Pennsylvania Supreme Court did not rely on the allegedly constitutional privilege that *Herbert v. Lando* rejected. It did not recognize any privilege, allegedly conferred by the First Amendment, exempting a party from complying with discovery rules or any other rules of civil procedure. Rather, it relied on Pennsylvania's rules of civil procedure.

Herbert v. Lando is not inconsistent with that decision, because *Herbert v. Lando* does not purport to exempt defamation plaintiffs from complying with the otherwise applicable rules of civil procedure governing the courts in which they choose to file suit. Indeed, as demonstrated, it does exactly the opposite. *Herbert v. Lando* expressly recognized that defamation plaintiffs are subject to general rules of civil procedure, and exhorted courts to use those rules to control the litigation before them. That is precisely what the Pennsylvania Supreme Court did here.

II. REVIEW IS ALSO NOT MERITED ON ANY OTHER BASIS.

Petitioners offer no reasons for this Court to accept review other than the supposed inconsistency with *Herbert v. Lando*, and respondents are not aware of any. Petitioners do not assert that the decision below conflicts with a decision by a United States Court of Appeals or the highest court of another state. They do not claim that the Pennsylvania courts have misunderstood the actual malice standard recognized by this Court. And they do not indicate why it is an important question of federal law that they be exempted from Pennsylvania pleading requirements. This Court may well not have jurisdiction to review the question presented. To the extent that it would have jurisdiction, there are no compelling reasons to exercise it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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